

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BRYAN SMITH,

Plaintiff,

-v-

SAKI RESTAURANT CORP. and ISAMI NAGAI,

Defendants.

10 Civ. 8237 (PAE)

ORDER ADOPTING
REPORT &
RECOMMENDATION**PAUL A. ENGELMAYER, District Judge:**

Plaintiff Bryan Smith filed a letter motion on July 18, 2011 seeking sanctions against defendant Isami Nagai in response to Nagai's failure to appear for a Court-ordered deposition on July 15, 2011. The Honorable Colleen McMahon, to whom this case was then assigned, referred the motion for sanctions to Magistrate Judge James C. Francis IV pursuant to 28 U.S.C. § 636(b). On August 3, 2011, Judge Francis issued his Report and Recommendation to this Court, recommending that plaintiff's motion be granted and that a default be entered against defendant Nagai.

A. Applicable Legal Standard

In reviewing a Report and Recommendation, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). When specific objections are made, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). To accept those portions of the report to which no timely objection has been made, "a district court need only satisfy itself that there is no clear error on the face of the record." *King v. Greiner*, No. 02 Civ. 5810, 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009) (citation omitted); *see also Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003). Defendant Nagai has lodged no objection to Judge Francis's Report and Recommendation that a default be entered against him.

B. Discussion

Careful review of the Report and Recommendation reveals that there is no facial error in its conclusions. Defendant Nagai's failure to object in a timely manner to the Magistrate Judge's report and recommendation operates as a waiver of appellate review. *See DeLeon v. Strack*, 234 F.3d 84, 86 (2d Cir. 2000) (citing *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989)).

CONCLUSION

The Report and Recommendation is adopted in its entirety. The Clerk of Court is DIRECTED to enter a default against defendant Isami Nagai.

As Judge Francis observed in the Report and Recommendation, because no default has been entered against the corporate co-defendant, Saki Restaurant Corporation, an inquest to determine damages is premature.

However, plaintiff's counsel indicated in a letter to the Court, dated August 22, 2011, that it did not need to proceed against the remaining defendant, Saki Restaurant Corporation, if it obtained a default judgment against defendant Nagai. If plaintiff wishes to discontinue this case against Saki Restaurant Corporation, the Court will refer this case to Judge Francis for an inquest forthwith.

Accordingly, plaintiff's counsel is directed to notify the Court by letter, no later than February 6, 2012, whether it will proceed against the remaining defendant or will discontinue.

SO ORDERED.

Paul A. Engelmayer

Paul A. Engelmayer
United States District Judge

Dated: January 25, 2011
New York, New York